

Institutional Controls and Periodic Reviews

Issue

What modifications to the institutional controls provisions in Sections - 420 and - 440 of the Model Toxics Control Act (MTCA) cleanup regulation are needed to update these sections based on experience to date and to comply with the Uniform Environmental Covenants Act and corresponding changes to MTCA?

Problem Statement

With the passage of the Uniform Environmental Covenants Act (UECA), the terminology and procedural requirements in Section 440 and other related Sections need to be updated. One of the statutory changes to MTCA in the same bill that passed UECA was to set a schedule for Ecology reviewing the performance of sites with institutional controls already in place (“periodic reviews”). Ecology is in the process of conducting these reviews. These reviews have identified a number of problem areas that need to be addressed. Furthermore, as Ecology staff have implemented the existing rule over the years, a number of issues have arisen needing clarification in the rule. These issues and proposed options for resolving them are summarized in table 1.

Background

The Model Toxics Control Act cleanup regulation includes a section specifically addressing the application of institutional controls at cleanup sites. Institutional controls are defined as measures undertaken to limit or prohibit activities that may interfere with the integrity of an interim action or cleanup action or that may result in exposure to hazardous substances at a site. Institutional controls may include:

- (a) Physical measures such as fences.
- (b) Use restriction such as limitation on the use of property or resources or requirements that cleanup action occur if existing structures or pavement are disturbed or removed.
- (c) Maintenance requirements for engineered controls such as the inspection and repair of monitoring wells, treatment systems, caps or ground water barrier systems.
- (d) Education programs such as signs, postings, public notices, health advisories, mailings, and similar measures that educate the public and/or employees about site contamination and ways to limit exposure.
- (e) Financial assurances.

Ecology estimates there are currently some 300 sites with institutional controls in place.

In 2007, the Legislature passed the Uniform Environmental Covenants Act (Chapter 64.70 RCW). This act imposes certain additional procedural requirements on activity or property use limitations (“environmental covenants”) that are not reflected in the current rule.

Options

Ecology is considering the following potential changes to Sections 420 and 440 of the MTCA rule.

Current Provision Periodic Reviews (WAC 173-340-420)	Under Consideration	Comment
Periodic reviews are required for formal sites only and optional for sites in the voluntary cleanup program (VCP sites) .	Require for all sites, including VCP sites.	Reflects new requirement in 70.105D.030(7).
Periodic reviews are required when institutional controls and/or financial assurances are required as part of a cleanup action.	Add a requirement for periodic reviews of sites with interim actions.	Some sites can be in interim action status for years for a variety of reasons (recalcitrant PLP, technological limits, legal delays). May want to make at Ecology’s discretion.
Timing of when a periodic review is conducted is unclear (5 years after initiation of cleanup action).	5 years after recording of the environmental covenant.	Reflects new requirement in 70.105D.030(7). Rule language also needs to address situations where a covenant is required but not implemented and, where alternative mechanisms are used.
Contents of periodic review not specified.	Add contents of periodic review.	2007 amendments to MTCA added minimum requirements for a periodic review. Rule should also reflect current practice.

Current Provision Periodic Reviews (WAC 173-340-420)	Under Consideration	Comment
<p>Cost recovery for periodic reviews not explicitly addressed.</p>	<p>Clarify that periodic reviews are remedial actions subject to cost recovery under MTCA.</p> <p>There are several options:</p> <ul style="list-style-type: none"> • Require that potentially liable persons (PLPs) proposing cleanups with periodic reviews to pay for these reviews up front at the time of the no further action (NFA) determination or settlement. • Add language to orders or decrees more clearly requiring payment for the costs of periodic reviews. • Add a payment provision to the environmental covenant. • Build costs of periodic reviews into Ecology's overhead rate. 	<p>As Ecology conducts periodic reviews, we are finding many properties have changed hands numerous times. This can sometimes make it difficult to recover costs for periodic reviews in subsequent years, particularly for independent cleanups.</p>
Current Provision Institutional Controls (WAC 173-340-440)	Under Consideration	Comment
<p>“Deed restrictions”</p>	<p>Throughout rule, replace with “environmental covenant” and update definition to be consistent with the statute.</p>	<p>Term used in UECA.</p> <p>May need to add language explaining procedures for past deed restrictions not recorded prior to UECA.</p>
<p>Section 440 of the MTCA rule specifies the procedures for imposing, modifying and removing deed restrictions.</p>	<p>Update to reflect the requirements in UECA.</p>	<p>RCW 64.70.090 and 64.70.100 address additional termination and amendment requirements.</p>

Current Provision Institutional Controls (WAC 173-340-440)	Under Consideration	Comment
Deed restrictions on public right of ways not explicitly addressed.	Should Ecology provide for a specific alternative mechanism for restrictions on public ROWs?	Public and private ROWs (roads, utilities) are often impacted by contaminated sites. Deed restrictions may not always be the most effective way to limit digging in these areas and may face practical limitations in some contexts.
Section 440 specifies content of deed restrictions.	Update to reflect UECA requirements. (See attached.) Option 1: Only include mandatory UECA requirements. Option 2: Include mandatory and optional UECA requirements.	Many optional requirements are already required by MTCA. Should Ecology be the only holder of these covenants or are others allowed to be holders? Currently, by policy, Ecology is generally the holder.
PLPs must make a “good faith effort” to obtain deed restrictions on properties not owned by the PLP.	Should we clarify what “good faith effort” means? Should we clarify how this relates to non PLPs?	Is there a better way to address off-property activity and use restrictions?
Ecology is required to “notify and seek comment from” a city or county department with land use planning authority for real property subject to the restrictive covenant.	Update to reflect UECA requirement that Ecology “consult with” the city or county land use planning authority for the site and that Ecology “shall consider potential redevelopment and revitalization opportunities and obtain information regarding present and proposed land and resource uses, and consider comprehensive land use plan and zoning provisions applicable to the real property subject to the environmental covenant.”	See RCW 70.105D.030(1)(f) and RCW 64.70.040(5).

Current Provision Institutional Controls (WAC 173-340-440)	Under Consideration	Comment
Not addressed	Should the rule clarify the status of pre-UECA deed restrictions and improperly worded or recorded covenants under UECA?	For example, covenants not including Ecology's signature or other minimum requirements specified in rule.
<p>Financial assurance requirements waived as appropriate for PLPs that have sufficient financial resources available and in place to provide for the long-term effectiveness of engineered and institutional controls.</p> <p>Financial assurance waived when a PLP can demonstrate that requiring financial assurances will result in the PLPs for the site having insufficient funds to conduct the cleanup or being forced into bankruptcy.</p>	<p>Should these exemptions be re-examined?</p> <p>Option 1: No change from current rule.</p> <p>Option 2: Require all sites with institutional controls to post financial assurance covering at least the cost of future monitoring and periodic reviews.</p> <p>Option 3: Require all sites with institutional controls to post full financial assurance.</p>	<p>Current limitations result in few sites being required to post financial assurances at a time when more sites are using containment remedies and the financial stability of many companies has come into question nationally.</p> <p>Under Option 2 may need to add criteria for when other financial assurances would be required.</p>

Factors to Consider When Selecting Options

Developing amendments to the MTCA cleanup regulation will require considering and balancing of a number of issues and interests. These amendments will need to consider several regulatory goals, including the following:

- Providing consistent standards and methods for managing institutional controls and periodic reviews.
- Providing flexibility to address site-specific conditions.
- Ensuring remedies are protective over the long term.
- Simplifying administrative procedures for implementation of institutional controls and periodic reviews.
- Improving the clarity and usability of the rule.

CURRENT MTCA REQUIREMENTS FOR RESTRICTIVE COVENANTS

(WAC 173-340-440(9))¹

(9) Restrictive covenants. Where required, the restrictive covenant shall:

(a) Prohibit activities on the site that may interfere with a cleanup action, operation and maintenance, monitoring, or other measures necessary to assure the integrity of the cleanup action and continued protection of human health and the environment;*

(b) Prohibit activities that may result in the release of a hazardous substance that was contained as a part of the cleanup action;*

(c) Require notice to the department of the owner's intent to convey any interest in the site. No conveyance of title, easement, lease, or other interest in the property shall be consummated by the property owner without adequate and complete provision for the continued operation, maintenance and monitoring of the cleanup action, and for continued compliance with this subsection;**

(d) Require the land owner to restrict leases to uses and activities consistent with the restrictive covenant and notify all lessees of the restrictions on the use of the property. This requirement applies only to restrictive covenants imposed after February 1, 1996;**

(e) Require the owner to include in any instrument conveying any interest in any portion of the property, notice of the restrictive covenant under this section;**

(f) Require notice and approval by the department of any proposal to use the site in a manner that is inconsistent with the restrictive covenant. If the department, after public notice and comment approves the proposed change, the restrictive covenant shall be amended to reflect the change; and**

(g) Grant the department and its designated representatives the right to enter the property at reasonable times for the purpose of evaluating compliance with the cleanup action plan and other required plans, including the right to take samples, inspect any remedial actions taken at the site, and to inspect records.**

¹ Items noted with a “*” are similar to mandatory requirements under UECA. Items noted with a “**” are similar to optional requirements under UECA.

CONTENTS OF AN ENVIRONMENTAL COVENANT UNDER CHAPTER 64.70 RCW²

Mandatory Requirements:

- (1) An environmental covenant must:
 - (a) State that the instrument is an environmental covenant executed pursuant to this chapter;*
 - (b) Contain a legally sufficient description of the real property subject to the covenant;*
 - (c) Describe with specificity the activity or use limitations on the real property;*
 - (d) Identify every holder;*
 - (e) Be signed by the agency, every holder, and unless waived by the agency every owner of the fee simple of the real property subject to the covenant; and*
 - (f) Identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.**

Optional Requirements:

- (2) In addition to the information required by subsection (1) of this section, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it, including any:
 - (a) Requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, applications for building permits for, or proposals for any site work affecting the contamination on, the property subject to the covenant;*
 - (b) Requirements for periodic reporting describing compliance with the covenant;**
 - (c) Rights of access to the property granted in connection with implementation or enforcement of the covenant;*
 - (d) Narrative descriptions of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;**
 - (e) Limitations on amendment or termination of the covenant in addition to those contained in RCW 64.70.090 and 64.70.100;**
 - (f) Rights of the holder in addition to its right to enforce the covenant pursuant to RCW 64.70.110;**
 - (g) Other information, restrictions, or requirements required by the agency, including the department of ecology under the authority of chapter 70.105D RCW.**
- (3) In addition to other conditions for its approval of an environmental covenant, the agency may require those persons specified by the agency who have interests in the real property to sign the covenant.**

² Items noted by a “*” are already required in some form under the current rule or through the covenant boilerplate. Items noted by a “**” are not routinely required under the current rule or boilerplate.